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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 359

JIMMIE JOHNSON,
Petitioner,
vs.
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals, not yet reported appears in Appendix to this Petition (*infra*, p. 13).

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 1965. Petition for Rehearing was denied by the Court of Appeals on June 18, 1965. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Was the Trial Court in error by refusing to instruct the jury as to defendant's requested charges whether he was a banker, pickup-man or writer where defendant was charged with violating Sections 7203, 4411 and 4412 of Title 26 United States Code.

STATUTES INVOLVED

1. Title 26, U.S.C., Section 4401:

Imposition of tax

(a) Wagers.—There shall be imposed on wagers, as defined in Section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the tax-payer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this sub-

chapter has been collected as a separate charge from th person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wages shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under Section 4412 who received wagers for or on behalf of another person without having registered under Section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

2. Title 26, U.S.C., Section 4411:

Imposition of tax

"There shall be imposed a special tax of $50.00 per year to be paid by each person who is liable for tax under Section 4401 or who is engaged in receiving wagers for on on behalf of any person so liable."

3. Title 26, U.S.C., Section 4412:

Registration

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, th name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

4. Title 26, U.S.C., Section 4421:

Definitions

(1) Wager.—The term "wager" means—

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) Lottery.—The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include—

(A) any game of a type in which usually

(i) The wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

5. Title 26, U.S.C., Section 7203

Wilful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information who wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT OF FACTS

(Numbers in parentheses refer to pages of Appellant's appendix)

Petitioner was charged in a two Count indictment (2a) with accepting wagers as defined by Section 4421 of Title 26 United States Code in Count I and with receiving wagers for and on behalf of another in Count II. The United States Attorney then moved to dismiss Count II at the conclusion of the Government's case (19a).

Counsel for petitioner than submitted to the Trial Court requests for special instructions (22a, 24a, 41a) relative to whether petitioner was a "banker, writer, or pickup-man" and said requests were refused by the court (23a, 24a). Petitioner was then found guilty by a jury of violating Sections 7203, 4411 and 4412 of Title 26 Unitted States Code.

The United States Circuit Court of Appeals affirmed the Lower Court's decision, and petitioner now applies for a Writ of Certiorari to the United Staes Court of Appeals for the Sixth Circuit upholding the denial of the requested instructions.

REASONS FOR GRANTING WRIT

The Court of Appeals for the Sixth Circuit places great significance on the fact that the statutes involved fail to use the terms "banker", "writer," "pickup-man" or headquarters man and that the aforementioned terms are merely "argot of policy wagering." Nothing could be farther away from the intent of Congress in passing the legislation for the collection of excise taxes. As was stated in

United States v. Calamaro, 354 U.S. 351, 353. "A numbers game involves three principal functional types of individuals: (1) the 'banker' who deals in the numbers and against whom the player bets; (2) the 'writer', who, for the banker, does the actual selling of the numbers to the public, and who records on triplicate slips the numbers sold to each player and the amount of his wager; and (3) the "pickup-man", who collects wagering slips from the writer and delivers them to the banker." While petitioner concedes that this was a case revolving around whether a the 'pickup-man', who collects wagering slips from the court in *Calamaro* page 360 also said that it was obvious respondent could not be convicted of accepting wagers. "In light of the unambiguous legislative history showing that the excise tax applies only to one who is 'engaged in the business of accepting wagers' as a principal on his own account "in this instance, *that means the banker*, as the *Government concedes*". (Emphasis added.)

The imposition of a greater tax upon one who accepts wagers on his own account namely the "banker" than upon one who receives wagers on behalf of another who is called a "writer" shows the need for the courts to draw a distinction.

In petitioner's case, after the government on motion dismissed Count II in which petitioner was charged with receiving wagers for and on behalf of another (19a), the only charge remaining was whether petitioner was an acceptor of wagers or "banker" remain to be considered.

Counsel for petitioner submitted his instructions regarding whether petitioner was a writer, pickup-man or banker ond the following colloquy re Requests to Charge occurred (22a and 23a):

"The Court: There is no evidence concerning the activity of any banker. Why should that be brought into the case?

Mr. Papps: We asked the defense witness concerning the status of each individual in the numbers business, to explain it to us. At that time he said what a banker was and what the pickup man was.

The Court: He explained it, but why should the Court explain it to the jury when there is no evidence bearing on the question of a banker?

Mr. Papps: If he is picking up bets and does not write them, then he would be a pickup man.

The Court: There is no evidence here, I don't think, directed to the activity of the defendant as a pickup man. The evidence is that he received a wager of the witness, and the witness saw him receive wagers from other people at the same time in this market.

Now, what has that to do with being a pickup man? He is charged with being a receiver, receiving wagers.

Mr. Papps: That is right, sir, and if they do find that he was only picking up wagers, then he would come under the wording—we get the wording from the Colamera and Ingraham cases, and the definitions are from those cases.

The Court: What do you think about that?

Mr. Bancroft: It is a catchall category. The Government's position is that the defendant could be a pickup man and writer; he can be both at the same time and be in the business.

The Court: Yes, but you stand on the charge, that is, Count One.

Mr. Bancroft: But that does not exclude that he is a pickup man. He is a receiver.

The Court: Do you object to this form of charge?

Mr. Mattimoe: Yes, sir.

The Court: I will refuse that. I think it would only be confusing it in bringing to the attention of the jury various definitions in connection with which

there is no evidence here. There is no charge that this defendant was a banker or pickup man. If he was receiving wagers, and they so determined, that's it. If they determined he wasn't, then he is not guilty.

No. 4: The Court instructs the jury that if the defendant in this case could reasonbly be either a banker, a pick-up man, or a writer, and that under all the circumstances proved in the trial, there is no manner of determining which of the three the defendant is; then this defendant must be acquitted.

I believe that is drawn on the same theory as Request No. 3. I see no reason for complicating the matter for the jury in having them mull over the question of whether or not this defendant, in the activities that have been placed in evidence, was engaged as a banker or a pickup man.

I think I will refuse that."

It is noteworthy that not until the appellee filed their reply to Petition for Rehearing that any assertion was made that petitioner could have been the "banker" (referring to pages 2 & 3), instead prior to this the government's position was anyone having sort of proprietory interest was an aceptor or banker. The government claim that there was no evidence to support the theory of requiring the court to define the different classes in regard to policy wagering was completely unfounded in law or fact. The Court of Appeals for the Sixth Circuit undoubtedly does not make any distinction between "writers" or "bankers" as can be noted from page 2 of their decision. "There was no evidence to support the theory that he was a member of one of *several classes* of gamblers or persons *engaged in accepting wagers;* and he was not entitled to an instrution defining such classes." (Emphasis added.)

It is obvious that there is only one (1) class engaged in accepting wagers and that is a "banker."

United States v. Pepe, 198 F. Supp. 226 (Delaware 1961) is quite similar to the instant case for there the trial court gave instructions to the effect that "if you should find that the Defendant was engaged in the business of accepting wagers—that is acting as a "*writer* or *banker*" (emphasis added), the jury could convict. The court reversed the conviction realizing that the defendant could possibly have been convicted for a crime which he was not even charged. Plaintiff-Appellee disagrees with the holding in *United States v. Pepe, supra,* and cites *United States v. Manos,* 340 F.2 534 (CCA 3rd 1965), as authority that you can be either a writer or a banker and be charged with accepting wagers. The error in the government position is that in this case an information was drawn *conjunctively* (emphasis added) charging defendant with accepting wagers *or* receiving wagers on behalf of another in a single count. The court expressly stated on page 538 that it affirmed the classifications laid down in *United States v. Pepe, supra* and would so hold if the information had not been drawn in the Conjunctive.

> An examination of the statutes, which have been adverted to heretofore, 4401, 4411, 4412, 4421, 26 U.S.C.A., reveals there is a differentiation between a banker and numbers writer, that is between a person who is engaged in the business of accepting wagers, a banker and a receiver, one who receives wagers for or on behalf of any person. This differentiation is set out in *United States v. Calamaro,* 354 U. S. 351 at 353, 77 S. Ct. 1138, 1 L.Ed. 2d 1394. While in that case under the facts there obtaining, the Court held that the acceptor and receiver were labels which could be interchanged—were different side of the same coin—by the reason of the fact that the particular problem involved was whether or not a pickup man who picked up the slips from a numbers writer or receiver and carried them to the

banker, was an individual who came within the intendment of the statute making him criminally liable. The Court held he was not. It is submitted, *United States v. Calamaro, supra,* is not to be construed as holding that no differentiation obtains in the various sections of the statute here in question. This for the reason that with respect to a banker, the person against whom the player bets, must pay a 10% excise tax on the gross amount of the wagers he receives, pursuant to 4401 (a) as well as a special tax of $50.00 per year as set forth in 4411, and, additionally, he must register and furnish certain information to the Internal Revenue District in which he is located, 4412 (a). However, with respect to a person who receives wagers, a writer for or on behalf of a person so engaged in the business of accepting wagers, he is subject only to the $50.00 special tax and the registration requirements for a writer are much less rigorous than for bankers. This is so because in the registration prescribed in 4412 (2), which is that for a banker, the information which he must give is far more detailed than that for a receiver or writer, as set forth in 4412 (a) (3). This differentiation was recognized in *United States v. Pepe,* 198 F. Supp. 226, aff'd per curiam by this Court 1964, 399 F.2d 264, where the defendant was charged by information engaging in the business of accepting wagers and unlawfully failing to register, as well as to pay the special tax required by law. It was there held that since the Court's charge permitted the jury to convict Pepe of being a writer of numbers, when there was no such charge in the information, there was created such a variance between it and the charge of the court to permit the conviction of another offense, which affected the substantial rights of the accused.

United States v. Nicholas, 224 F. Supp. 311 (D.C. Penn. 1963) also held that the mere fact of writing a wager does

not make a party an acceptor of wagers and that further proof is necessary to charge a person with being a "banker".

United States v. Sette, 334 F.2 267 (CCA 2nd 1964) recognized the necessity for proper classification if a person is charged with being engaged in accepting wagers. There must be proof from the evidence that the defendant is in fact the "banker" and not some other functionary.

From reading of the applicable statutes and the various cases cited it clearly shows that petitioner was entitled to have his requested instructions submitted to the jury. The decision of the Sixth Circuit Court of Appeals is in direct conflict with decisions of the Second and Third Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons we ask that the Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

JUDGMENT OF COURT OF APPEALS

(Filed May 11, 1965)

No. 15916

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JIMMIE JOHNSON, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Ohio, Western Division.

Decided May 11, 1965.

Before: MILLER and EDWARDS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

PER CURIAM. Appellant was indicted for the offense of engaging in the business of accepting wagers, and for wilfully failing to register and pay the special occupational tax, in violation of Title 26, U.S.C.A., Sections 4411 and 4412. On a trial before a jury, he was convicted, and, from the judgment entered thereon, he appeals.

Appellant claims that the trial court erred in refusing his requests to charge the jury; in the admission of an exhibit; and in permitting, over objection, the testimony of a government witness who had violated a ruling of the court that all witnesses be separated; that appellant was

erroneously convicted because the indictment was repugnant and duplicitous; that the trial judge was guilty of error in repetitiously referring to the possibilities of sentence; and that the court erred in denying defense counsel the right to inquire as to the "criminal record" of a government witness.

The claim that the trial court erred in refusing appellant's requests to charge is based upon the fact that the court denied his proposed instructions as to whether or not appellant was a "pick-up man," "banker," "writer," or a "headquarters man," as known in the parlance of "policy" or wagering by slips. None of these terms is used in the statute; and there were no requirements or need that they be explained in the instructions. The court properly told the jury that appellant was charged with being engaged in the business of accepting wagers, as well as wilfully failing to register and pay the special tax required by statute. In addition, the court read to the jury the various sections of the statute applicable to the offense, and those parts of the indictment relating thereto. This was sufficient, and it was not necessary to explain the argot of policy wagering. The government's evidence was directed to prove that appellant had accepted wagers. There was no evidence to support the theory that he was a member of one of several classes of gamblers or persons engaged in accepting wagers; and he was not entitled to an instruction defining such classes.

With regard to the claim of error in the introduction of evidence, this refers to the exhibits of slips which had been delivered to a man who was a government investigator and, afterward, a witness in the case; and it was submitted as evidence of a lottery wager he had placed. Appellant had accepted the wager and had written the slip, and was present when the wager, represented by the exhibit, was placed. This exhibit had probative evidence indicating that appellant was in the business, and justified an inference that he was in the business of accepting wagers.

In regard to the claim of error that a witness had violated a ruling of the court that all witnesses be separated

during the trial, it is the law that the violation of the rule does not automatically bar a witness from testifying, but is a matter within the court's discretion. *United States v. Bostic,* 327 F.2d 983, C.A. 6; and the exercise of such discretion will not be disturbed, except in case of clear abuse. *Powell v. United States,* 208 F.2d 618, C.A. 6. Moreover, the answers of the witness were not affected because of his presence in court, as it appears that he was drawing only on his own experience in giving his testimony. The court stated at the outset of his testimony that if any question were asked, the answer to which might, in any respect, be affected because of the presence of the witness, at any previous session of the court, it would be ruled out.

As to the indictment's being duplicitous, it charged that appellant had violated Title 26, U.S.C.A. by not complying with the provisions of Title 26, U.S.C.A. Sections 4411 and 4412. These, in themselves, are not criminal sections, but are provisions requiring registration and payment of the special occupational tax. It is Section 7203 of Title 26 which provides the penalty for violation of the prior sections. We consider that the inclusion of the three sections above mentioned in a single count would not render the indictment duplicitous. *Travis v. United States,* 247 F.2d 130, C.A. 10. In any event, defects in an indictment, other than claims that it fails to show jurisdiction in the court, or that it does not charge a crime, may be raised only by motion before trial. Here, there was no motion filed before trial raising the question, and, while a motion to dismiss was filed, it did not mention the question of duplicity which was raised for the first time on this appeal. The claim of error based on this ground is without merit.

Appellant's contention that the trial court was guilty of error in his instructions to the jury by repetitiously referring to the possibilities of sentence, is without substance, and, moreover, was not objected to at the trial. It, therefore, cannot now be considered. Rule 30 of the Federal Rules of Criminal Procedure.

Claim of error is based upon the court's ruling that defense counsel could not ask a government witness on cross-

examination if he had a criminal record. The cross-examination was as follows:

> "Q. Have you ever been arrested or does the government have anything on you?
> A. No, sir.
> Q. Ever been arrested for numbers?
> A. No, sir.
> Q. You have no criminal record?
> Mr. Mattimoe; I object, your Honor.
> The Court: Objection sustained."

The court properly sustained the objection. Such questions relating to prior offenses of a witness must be limited to asking him whether he has been convicted of a felony or of a crime; and such crimes must be of a character involving moral turpitude. *Henderson v. United States*, 202 F.2d 400, C.A. 6.

No reversible error appearing in the court's instructions, or in the conduct of the trial, the judgment is affirmed.

ORDER DENYING PETITION FOR REHEARING

(Filed June 18, 1965)

Before: MILLER and EDWARDS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

The petition for rehearing herein is hereby denied.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 359

JIMMIE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-16) is reported at 345 F. 2d 457.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1965. A petition for rehearing was denied on June 18, 1965. The petition for a writ of certiorari was filed on July 17, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The indictment charged, and the evidence showed, that petitioner was in the business of accepting wagers. The question is whether it was error for the court to refuse petitioner's request to charge on the differences between a banker, writer and pick-up man.

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Ohio on an indictment charging that, from July to October 1963, he was engaged in the business of accepting wagers and willfully failed to register and pay the special tax required by law (see R. 2a). A second count, charging acceptance of wagers on behalf of another, was dismissed at the close of the government's case (R. 19a). Petitioner was sentenced to imprisonment for one year and fined $500 (R. 42a).

The evidence shows that a government agent observed petitioner regularly arrive at a shop with bags of numbered wagering slips which he would add up on an adding machine. Petitioner also received tickets and money from others. While at the shop, petitioner would himself accept bets from customers. The agent placed a bet with petitioner in September, 1963 (R. 6a-10a, 1b-7b). It was stipulated that petitioner had not registered and paid the tax.

The court denied petitioner's request to define "pick-up man" and "banker" (R. 22a) and to charge that, if there was no way of determining whether petitioner were a banker, pickup man or writer, he

would have to be acquitted under the indictment (R. 24a). The district court instructed the jury that the government had to prove beyond a reasonable doubt "that the defendant did knowingly and wilfully fail to register and pay the special tax after or at the time of being in the business of accepting wagers" (R. 34a). It read the statutory definition of wager and explained what was meant by being in business (R. 38a-39a).

In affirming the conviction, the court of appeals held that it was "not necessary to explain the argot of policy wagering. The government's evidence was directed to prove that appellant had accepted wagers. There was no evidence to support the theory that he was a member of one of several classes of gamblers or persons engaged in accepting wagers; and he was not entitled to an instruction defining such classes" (Pet. App. 14).

ARGUMENT

The court of appeals properly held that, when the district court charged the jury that it had to find (as the indictment charged) that petitioner engaged in the business of accepting wagers without having paid the special tax, it placed the issue in proper focus, and that it was unnecessary for the judge to define to the jury the status of banker, writer or pick-up man (terms explained in this Court's decision in *United States* v. *Calamaro*, 354 U.S. 351). The evidence showed unequivocally that petitioner engaged in the business of accepting wagers. That is all the statute

requires for liability for registration and payment of the special tax of $50. Section 4401 makes liable for the tax on the wagers themselves "[e]ach person who is engaged in the business of accepting wagers," and Sections 4411 and 4412 require registration and payment of the $50 tax by "each person who is liable for tax under Section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

The essence of petitioner's argument is that only a "banker" accepts wagers under the statute (Pet. 9) and that a "writer", even though he must register and pay the tax, can be charged only as one who receives wagers on behalf of another. He relies upon two district court cases which do hold that only the banker is the "acceptor" of wagers and that, where defendant is charged with failure to register and pay the $50 tax, he cannot be convicted without proof as to whether he "accepted" the wagers on his own behalf or "received" them on behalf of another. *United States* v. *Pepe*, 198 F. Supp. 226 (D. Del.), and *United States* v. *Nicholas*, 224 F. Supp. 310 (W.D. Pa.). However, in *United States* v. *Manos*, 340 F.2d 534, the Court of Appeals for the Third Circuit recognized that the $50 tax must be paid by anyone who either accepts wagers on his own behalf or receives wagers on behalf of another, and upheld a conviction where the defendant was charged with being either.*

---

* The decision in *Manos* indicates that the Third Circuit had affirmed the above cited *Pepe* decision reported at 198 F. Supp. 226 *per curiam* in 339 F.2d 264 (see Pet. 11). This is an error. The decision affirmed in 339 F.2d 264 was the denial of a motion for a new trial by the defendant Pepe after he had been convicted on a second trial. See 209 F. Supp. 592.

See also *United States* v. *Pasha*, 332 F.2d 193 (C.A. 7), to the same effect. Thus it makes no difference, in relation to the duty to register and pay the $50 tax, whether a person receives wagers for himself or for another; anyone who is in the business of taking wagers from a bettor must register and pay that tax. There is thus no reason why, on this aspect, the indictment should charge or the proof should show more than the controlling fact that the defendant was in the business of receiving wagers. In this Court's *Calamaro* decision, *supra*, holding that a "pick-up man" (*i.e.*, one who merely carries slips from the writer to the banker) was not liable to register and pay the tax because he was not a receiver of wagers, the Court made it clear that a bet is "accepted" when it is placed by the bettor. It said (354 U.S. at p. 355): "it is the making of a gambling contract, not the transportation of a piece of paper, to which the statute refers; and hence that, in such a case as this, it is the *writer* and not the pick-up man who is 'engaged in receiving wagers'" under the statute (emphasis supplied).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1965

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—§—

JIMMIE JOHNSON,
Petitioner,

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UNITED STATES OF AMERICA

—§—

Petition For Rehearing For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 1965. Petition for rehearing was denied on June 18, 1965. Petition for a Writ of Certiorari was filed July 17, 1965, and denied by the Supreme Court on October 11, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED

Was the defendant denied equal protection of the laws inasmuch as the sentence imposed (by admission in the Trial Record) depended upon and was a penalty for defendant's demanding and having a jury trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Article XIV, United States Constitution—Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Petitioner was charged in a two Count indictment with accepting wagers as defined by Section 4421 of Title 26 United States Code in Count I and with receiving wagers

for and on behalf of another in Count II. The United States Attorney then moved to dismiss Count II at the conclusion of the Government's case.

Petitioner entered a plea of not guilty and was tried before a jury. Petitioner was then found guilty my the jury after a three day trial of violating Sections 7203, 4411, and 4412 of Title 26, United States Code.

Petitioner was then sentenced to the maximum allowed by the Statute, i.e., One year in prison and a fine of Five Hundred ($500.00) Dollars. All others accused of the same offenses at the same time, after entering pleas of "guilty" received lesser sentences. (See Exhibit A, Infra Page 8, Appendix).

ARGUMENT

The petitioner in his original petition for a Writ of Certiorari did not previously present this argument.

The Trial Court stated in sentencing the accused:

> "I am not unmindful of the fact that here was a fairly extended trial before a jury at the expense of $500.00 to the tax payers. There was no defense put up except an attack upon the credibility of the government witness, Mr. Harris. I think in this case there will be a sentence of one year and a fine of $500.00. The Bond will be refixed at $5,000.00. That will be all." (1a)

An accused is given his choice: either he pleads guilty or faces the risk of getting the maximum penalty allowed.

This is and should be declared an improper practice

inasmuch as it places an accused in a position of fearing to avail himself of his right to be proven guilty. In addition it provides an effective two penalty method of treating the same offense.

Additionally, besides impairing a person's right to a jury trial and providing unequal treatment under the laws, it also deprives the accused of due process in that the general reputation of the Court becomes that of a tool for the prosecution rather than an asylum from inequality.

Even if a person braves that underlying threat of severe punishment and is found guilty by a jury, his penalty is a failure of equal protection because the sentence is discriminatory even though within statutory limits. Here, all others arrested at the same time and sentenced at the same time involving similar crimes received lesser sentences. The difference? The record speaks for itself.

The Supreme Court in Fay v. New York, 332 U. S. 261 (1947) stated:

> "We consider first the clause which forbids a State to 'deny to any person within its jurisdiction the equal protection of the laws'. This prohibits prejudicial disparities before the law. Under it a system which might be Constitutionally unobjectionable, if applied to all, may be brought within the prohibition if some have more favorable treatment. The inquiry under this clause involves defendant's standing before the law relative to that of others accused."

It is conceded that had the Trial Judge said nothing there would be no way of proving this complaint. Yet,

here, there is overt admission on the record that the penalty is based on the fact that a jury trial was had and that this cost the public money.

If, to use an example, a court in imposing a maximum sentence said "because you used a lawyer", or "because you filed a motion", or "because you refused to waive indictment", it would be an obvious violation of an accused's rights; yet this case is similar, and more serious inasmuch as the penalty is severe and discriminatory when viewed relative to others accused.

CONCLUSION

For the foregoing reasons as enumerated in this Petition for Rehearing it is requested that the Writ of Certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner
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3955 Martha Avenue
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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

—§—

UNITED STATES OF AMERICA
Plaintiff,
v.
JIMMIE JOHNSON,
Defendant.

CR 63-97

—§—

APPEARANCES:

JOHN MATTIMOE, Esq., Assistant United States Attorney
In behalf of the United States of America,

THOMAS G. PAPPS, Esq.,
In behalf of Jimmie Johnson.

—§—

TRANSCRIPT OF SENTENCING in above cause of action, before the Honorable Frank L. Kloeb, United States District Judge, on Friday, March 13, 1964.

THE COURT: Do you have anything to say, Mr. Johnson?

MR. JOHNSON: No. sir.

THE COURT: The report indicates that in 1960 and until the instant apprehension he was engaged as a used car salesman for Anderson Auto Sales. His commissions were received regularly each week and they averaged a certain sum.

MR. PAPPS: If the Court please, he is still in that business as well as in another sales position at the present time.

THE COURT: I am not unmindful of the fact that here was a fairly extended trial before a jury at the expense of $500. to the taxpayers. There was no defense put up except an attack upon the credibility of the government witness, Mr. Harris.

I think in this case there will be a sentence of one year and a fine of $500. The bond will be refixed at $5,000.00. That will be all.

EXHIBIT A

On March 13, 1964 the following were sentenced on the same charge of NON STAMP WAGERING. ALL PLEAD GUILTY EXCEPT PETITIONER.

Case No.	Name	Sentence
63-113	Michael Nickola	6 Months—$500.00 Time Suspended
63-101	Edward K. Smith	6 Months—$500.00 Time Suspended
63-114	Betty Jane Stewart	6 Months—$500.00 Time Suspended
63-97	Jimmie Johnson	1 Year—$500.00
63-106	Emmanuel Licata	6 Months—$500.00
63-107	Ernest Licata	6 Months—$500.00 Time Suspended
63-111	Paul McDonald	6 Months—$500.00
63-96	Ben Thomas	3 Months—$500.00
63-99	Horqce Newton	6 Months—$500.00 Time Suspended
63-102	Robert L. Smith	6 Months—$500.00 Time Suspended
63-103	Norman Blackman	6 Months—$500.00 Time Suspended
63-104	John Wright	Passed, due to defendent being in hospital
63-105	John H. Spencer	3 Months—$500.00
63-108	Charlie A. Smith	6 Months—$500.00 Time Suspended
63-115	Finous Richard Allen	3 Months—$500.00
63-116	Silas Alexander Means	6 Months—$500.00 Time Suspended

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 359

JIMMIE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE FOR THE UNITED STATES

The Court has requested a reply to the petition for rehearing in which it is contended that the trial judge erred in imposing sentence on petitioner by weighing against him the fact that he chose to stand trial. We note, at the outset, that this question was not raised in any form either in the district court or the court of appeals and that it was not presented in the petition for certiorari.

1. Petitioner relies upon the following statement of the trial court at the time of sentencing (Pet. for rehearing, App. 7):

> I am not unmindful of the fact that here was a fairly extended trial before a jury at the expense of $500 to the taxpayers. There

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> was no defense put up except an attack upon the credibility of the government witness, Mr. Harris.

When these remarks are read as a whole—in the context of the facts as developed at the trial—we think it fairly inferable that the judge was referring to the quality of the defense rather than the fact that defendant went to trial.[1]

The witness Harris testified that he observed petitioner regularly carry bags of numbered wagering slips to a store where he would total the bets on an adding machine. Harris actually saw petitioner accept bets and receive money and tickets from others (Tr. 8–30). The defense offered testimony by a friend of petitioner who allegedly was told by Harris, after petitioner's arrest, that he, Harris, had made a mistake about petitioner (Tr. 104–105, 111). In rebuttal, Harris brought out that this witness had tried to see if he was amenable to a bribe (Tr. 147).

Another illustration of the defendant's evidence is the testimony of a waitress employed at the Green Light Inn. She asserted that Harris, on the night before she gave her testimony, attempted to induce her to go to bed with him (Tr. 127–129). On cross-questioning, the waitress was unable to identify anyone who overheard Harris make the alleged advances although the incident supposedly occurred in a crowded bar; she claimed not to know the petitioner, but just happened to appear at his trial to give evidence on his behalf; finally, she acknowledged that

[1] We are filing with the Clerk the transcript of proceedings, and a copy of the pre-sentence report.

petitioner had personally asked her to be a witness (Tr. 129–132).[2] Moreover, the evidence showed that petitioner himself had also spoken to at least one other individual in an attempt to suppress information relevant to the manner in which he conducted his gambling operations (Tr. 140–141).

Every accused risks the possibility that a trial will turn up matters unfavorable to him. Here, as in other cases, the judge, after seeing and hearing the witnesses, apparently considered what he learned at the trial in deciding upon the sentence to be imposed upon petitioner. However, petitioner's character—exhibited by the nature of his defense—was a material element properly to be taken into account in arriving at an appropriate sentence. See *Williams v. New York*, 337 U.S. 241, 244, 247, 252.

Petitioner's listing of the lesser sentences received by persons arrested at the same time who chose to plead guilty (Pet. for rehearing, App. 8) constitutes an insufficient showing that the sentence imposed on petitioner was unreasonable. None of those persons was in any way connected with petitioner's operations. The United States Attorney informs us that investigation revealed three separate numbers operations in the Toledo area—that of petitioner; that of one Kovacs, who died before his trial; and that of three Besase brothers who, in September 1965, were convicted of evasion of the wagering tax and sentenced to imprisonment for five years. The persons

[2] Harris testified that at the time he allegedly accosted the girl he and a friend were in a theatre watching a telecast of a prize fight (Tr. 149–151).

listed in the appendix to the petition for rehearing were *employed* in the Besase or Kovacs operations. The evidence against petitioner indicated that he conducted his own operation and grossed about $5,000 a day. Petitioner's situation cannot fairly be compared to that of a mere employee in a different operation. In addition, the pre-sentence report on the petitioner (which was before the trial judge) sets forth his prior criminal record and further distinguishes his particular background from that of the others.

2. We do not for a moment suggest that it is permissible practice for a trial judge to add to a penalty because a defendant has rested upon his constitutional right to put the government to its proof.[3] Rather, we question, for the reasons noted above, whether this record demonstrates that this in fact occurred. If, however, the Court is of the view that the matter is sufficiently doubtful to call for further examination, we suggest that the appropriate course

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[3] In one such case, a reviewing court has ordered resentencing. *United States* v. *Wiley*, 278 F. 2d 500, 504 (C.A. 7). See, also, *Simpson* v. *United States*, 342 F. 2d 643 (C.A. 7); but note the differing views expressed at the 1959 Pilot Institute on Sentencing (26 F.R.D. 231, 285–289). On the other hand, the fact that several persons have committed the same crime does not of itself require parity in sentencing. 1964 Institute on Sentencing, 35 F.R.D. 381, 387–389 (remarks of Judge Youngdahl). A sentence should be "tailored for individualized treatment." *Id.* at 389. In that connection, a judge's observations of the defendant "during trial or at the time of sentence" are, like the pre-sentence report, important in assessing the defendant's attitudes and character. 1964 Institute on Sentencing, 37 F.R.D. 111, 123; 1959 Pilot Institute on Sentencing, 26 F.R.D. 231, 323, 327–328. See *Williams* v. *New York*, *supra*.

would be to grant the writ, vacate the sentence and remand the case to the court of appeals. As noted above, petitioner failed to raise the issue at any point in the proceedings prior to his petition for rehearing of this Court's order denying certiorari. If further proceedings are nonetheless deemed warranted, orderly procedure would suggest that the record be reviewed in the first instance by the court of appeals. Cf. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 497.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DECEMBER 1965.

END